UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

March 1, 1973

EEO
JOB

MEMORANDUM TO HEADS OF DEPARTMENTS AND AGENCIES

SUBJECT: Affirmative Action to Assure Equal Employment Opportunity

The Civil Service Commission has received a number of inquiries regarding the effect of recent court decisions on the Federal Government's affirmative action program to assure equal employment opportunity. To put aside any misunderstandings which may exist as to appropriate affirmative action to be used by Federal agencies, the Commission has set forth in the accompanying document its views as to affirmative action in the administration of the Federal personnel system in the light of current court decisions.

Properly executed affirmative action programs on the part of Federal agencies are required by Executive Order 11478 and by the Equal Employment Opportunity Act of 1972 and such programs must be an integral part of an active merit system. Merit employment systems cannot simply act passively in a nondiscriminatory manner but must take affirmative steps to make equal employment opportunity for all persons a reality. Affirmative action programs embody steps to assure equality of opportunity for employment, for training, for promotion and in all aspects of personnel management. Specific guidance on affirmative action programs has been provided to Federal agencies in CSC Bulletin 713-25 and my memorandum to Heads of departments and agencies of May 7, 1970, on upward mobility.

Affirmative action programs are designed to take positive steps so that "race, religion, nationality, and sex become irrelevant" and so that all citizens have an equal opportunity to compete for Federal Government employment and the benefits flowing therefrom. Our minority and female population constitutes a great pool of talent which has not yet been fully tapped for Federal employment. Given a fair opportunity to compete under true merit principles, they can and do obtain employment and advancement. Only in this way can there be progress while at the same time the personal rights of all citizens are protected.

Robert Hampton

Robert E. Hampton
Chairman

Attachment

OGC SUBJ: EQUAL EMPLOYMENT OPPORTUNITY

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

AFFIRMATIVE ACTION TO ASSURE EQUAL EMPLOYMENT OPPORTUNITY

Affirmative action programs are required of Federal agencies by Executive Order 11478 on Equal Employment Opportunity, and by section 717 of the Equal Employment Opportunity Act of 1972. These requirements are expanded upon and discussed in detail in Civil Service Commission instructions to agencies, particularly those dealing with the development of equal employment opportunity plans (CSC Bulletin 713-25) and upward mobility program activities. (CSC Memo for Heads of Departments and Agencies, May 7, 1970)

The Civil Service Commission is concerned that invidious discrimination and its effects be replaced with equality of opportunity in all aspects of our society which Government affects. It must be recognized that such a fight involves many different fronts (housing, education, employment, etc.). Employment is one area to which the individual brings the culmination of many stages in his earlier development. Federal managers must use all of their resources to see that any trace of race, sex, national origin, and other forms of invidious discrimination are removed and replaced by merit considerations, while at the same time discrimination in areas other than employment is being banished by others having appropriate responsibility for that outcome.

The key to Title VII of the Civil Rights Act of 1964, as amended, is equal employment opportunity--not equal employment which can only be achieved by arbitrary rule, but equal opportunity to compete for jobs on the basis of ability. Affirmative action programs are designed to carry the message and mandate of equal opportunity to employers, supervisors, personnel specialists, and, to the minority community, and to women; they are steps taken to insure equality of opportunity--opportunity to be considered for employment, for training, for promotion, for recognition and for all of the rewards made available by an employer.

Moreover, affirmative action is required to insure that discriminatory employment practices of the past are not permitted to perpetuate themselves into present discrimination. Thus, for example, where an employer has discriminated against a group in the past, to permit hiring based solely on word of mouth advertising, or membership based on family relationship, would be to perpetuate, in the present, past employment discrimination. Local 53 v. Vogler, 407 F.2d 1047 (CA 5, 1969); Papermaker and Paperworkers Local 189 v. U.S., 416 F.2d 980 (CA 5, 1969); cert. denied, 397 U.S. 919 (1970); Lea v. Cone Mills Corp., 301 F. Supp. 97 (M.D. N.C., 1969), aff'd in part and vacated in part on other grounds, 438 F.2d 86 (CA 4, 1971). Such practices must be changed, not to give special remedial rights to an ethnic or sex group, but rather to remove the facially neutral but factually discriminatory device so that all persons regardless of race and sex have the opportunity equally to compete for jobs and promotions on

the basis of ability. Clark v. American Marine Corp.,304 F. Supp. 603 (E.D. La., 1969); Papermakers and Paperworkers Local 189 v. U.S., supra. As both Clark and Papermakers make clear, the Equal Employment Opportunity Act is prospective only and cannot be used to cure past ills, but can, should, and must be used to wipe out present facially neutral practices which are in fact discriminatory because of past employment practices. It is in this sense that affirmative action programs are remedial--they remedy existing discriminatory practices by wiping them out and replacing them with equal opportunity to compete. They remedy the effect of past discrimination on present personnel practices in order to cleanse such practices of discrimination. Moreover, affirmative action programs are not and should not be passive but rather are positive measures designed to eliminate discrimination and promote equality of opportunity. Through such programs as job restructuring, outreach, recruitment, and upward mobility, affirmative action programs create and enhance opportunities for all persons, including minorities, to compete, on the basis of ability, for jobs and promotions. In this sense, affirmative action eliminates the vestiges and continuing effects of past discrimination. U.S. v. Hayes International Corp. 456 F.2d 112 (CA 5, 1972)

It is a misunderstanding regarding this special remedial nature of affirmative action programs which has led some persons erroneously to conclude that Title VII, court decisions and/or affirmative action programs, permit or require preferential hiring on an ethnic or sexual basis. Title VII is clear in stating, "Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex or national origin employed by any employer . . . " (§ 703(j)). Section 703(a) of that Act would prohibit such preference when it operated to discriminate against any other individual because of his or her race, color, national origin or sex. Section 717, which applies specifically to federal employment practices is clear: "all personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." Likewise the Intergovernmental Personnel Act prohibits discriminatory treatment--P.L. 91-648, Section 2.

In a few isolated fact situations, some courts, operating under their special authority contained in Section 706(g) of Title VII, have ordered limited racial hiring. U.S. v. Central Motor Lines, 325 F. Supp. 478 (W.D. N.C., 1970); NAACP v. Allen, 340 F. Supp. 703 (M.D. Ala., 1972) (Appeal pending); Carter v. Gallagher, 452 F.2d 315 (CA 8, 1971), cert. denied, 406 U.S. 950 (1972). Other courts have rejected the concept. Jackson v. Poston, (No. 18296, App. Div., 3rd Dept., Supreme Court,

New York [illegible] decisions permit governmental officials (not covered by 706(g)) to hire on a racial, ethnic or sexual basis. The Supreme Court has made it clear that Title VII:

> . . . does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. (Griggs v. Duke Power Co., 401 U.S. 424 at 430-431).

This does not mean that there should not be an increase in minority persons and women in government employment in occupations, geographic areas, and at grade and pay levels where their skills and abilities have not been adquately tapped. By opening doors wherever they have been closed to minorities and by affirmatively seeing that the word on availability of positions is sent out to the minority as well as to the rest of the community, by affirmatively acting to dismantle subtle as well as overt discriminatory practices inhibiting equal opportunity to compete, through upward mobility programs, etc., affirmative action programs have in fact resulted in an increase in minority employment. While total federal employment has declined by over 17,000 positions from May 1970 to May 1972, for example, minority employment increased by over 3,500 positions in that same period and has increased from 18.9% in November 1967 to 19.6% in May 1972. In addition the movement of minority and women employees to middle grade and upper levels is accelerating. For example, minority employment in grades 9 and above was 6.2% in May 1970 as compared to 7.2% in May 1972.

The establishment of goals and timetables is a useful management concept and should be used by federal agencies where they will contribute to the resolution of equal employment opportunity problems. Also, affirmative action to attain goals must be carried out in the context of the merit system for public employment. Such goals must not become quotas, nor may they be applied solely to achieve proportional representation. The Commission's policy on goals and timetables is set forth in a memorandum for Heads of Departments and Agencies, dated May 11, 1971. The President has said:

> With respect to those affirmative action programs, I agree that numerical goals, although an important and useful tool to measure progress which remedies the effect of past discrimination, must not be allowed to be applied in such a fashion as to, in fact, result in the imposition of quotas, nor should they be predicated upon or directed towards a concept of proportional representation.

Programs of hiring a ratio of minority applicants, proportionate hiring or selective certification based on race or sex, in order to achieve the numerical goals set, are not appropriate affirmative action tools, but would have the effect of resulting in quotas and are predicated upon a concept of proportional representation. They would violate Section 717 of the Equal Employment Opportunity Act of 1972 which provides that Federal Personnel Actions shall be made free from any discrimination based on race, color, religion, sex, or national origin.

In addition such programs would invade the personal constitutional right of other applicants, not members of the favored group, to equal protection and the opportunity equally to compete on the basis of ability rather than sex, ethnicity, race, or national origin. The Department of Justice in commenting on the Civil Rights Act of 1964 said:

> Finally, it has been asserted title VII would impose a requirement for 'racial balance'. This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all. (110 Cong. Rec. 7207, April 8, 1964)

And, in his opinion upholding the validity of the Philadelphia Plan the Attorney General made it clear that goals are not to be met by "any action which would violate section 703(a) or any other provision of Title VII"; moreover, that opinion makes it clear that there is "a requirement that each qualified employee and applicant be individually treated without regard to race." (Opinion of the Attorney General of the United States, Legality of revised Philadelphia Plan, Sept. 22, 1969).

It is important to remember that the right to equal protection guaranteed by the Fourteenth Amendment is a personal right guaranteed to each individual. Shelly v. Kraemer, 334 U.S. 1, 22 (1948). The Fourteenth Amendment does not grant group rights and does not permit a person to be denied his or her right to equal protection in favor of granting a group preference. Likewise, the Fifth Amendment due process clause is personal--"nor shall any person . . . be deprived of life, liberty, or property, without due process of law, . . . " Thus, an individual cannot be denied his right to equally compete for a government job because of such irrelevant considerations as race. (See, e.g., United Public Workers v. Mitchell,330 US 75, at 100 (1947))

We have all long since learned the hard lesson that historically-passive merit system administration did not produce equal opportunity. Hence, special emphasis became urgently necessary--so much so that during the last decade EEO became a special program in and of itself.

We have gained much experience since the early days with special emphasis and today we have new laws to support active equal employment opportunity efforts. The time has come, we believe, when affirmative action programs can no longer be viewed and operated as special emphases that will wither and disappear when certain goals are reached and certain balances are achieved. We are convinced that affirmative action must now and in the future be viewed as an integral and permanent element of active merit operations--so active, in fact, that discrimination, against any person, because of race, color, religion, sex, or national origin is prohibited, and all people receive equal opportunity in the employment process.

The touchstone of affirmative action is an aggressive merit system to insure equal opportunity for all citizens to compete for government employment and advancement on the basis of ability. In Griggs the Supreme Court specifically recognized the difference between qualified applicants and better qualified vis-a-vis less qualified. This is the basis of the merit system. As the Supreme Court said:

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. (401 U.S. at 436)

See also, Cooper v. Allen, F.2d , 5 EPD 8530, 8533 (CA 5, 1972); U.S. v. Hayes International Corp.,456 F.2d 112 (CAS 5, 1972); Clark v. American Marine Corp.,304 F. Supp. 603 (E.D. La., 1969).

It is the purpose of affirmative action programs to take positive steps to see to it that "race, religion, nationality, and sex become irrelevant" and that all citizens have an equal right to compete for federal government employment. Our minority and female population constitutes a great pool of talent which has not yet been fully tapped. Given a fair opportunity to compete, they can and do obtain employment and advancement. Only in this way can there be progress while the personal rights of all citizens are protected.

December 15, 1972